STATE OF MICHIGAN

COURT OF APPEALS

SANDRA K. AVERY, Individually and as Personal Representative of the Estate of ROBERT B. AVERY, Deceased, Plaintiff-Appellant,	UNPUBLISHED June 21, 2011
V	No. 296582 Genesee Circuit Court
GRAND TRUNK WESTERN RAILROAD, INCORPORATED, Defendant-Appellee.	LC No. 08-088101-NI

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action brought pursuant to the Federal Employer's Liability Act (FELA), 45 USC 51 *et seq.*, plaintiff, Sandra K. Avery, appeals as of right from the trial court's order granting summary disposition in favor of defendant, Grand Trunk Western Railroad. Because the trial court improperly excluded plaintiff's expert witness testimony, the trial court erred in granting defendant's motion for summary disposition, and, the trial court improperly denied plaintiff's motion to compel discovery, we reverse and remand for further proceedings consistent with this opinion.

I

Robert B. Avery worked for defendant for 28 years as a carman at defendant's "Flint Yard," in Flint, Michigan. Avery's work included considerable time as a welder. On February 6, 2005, Avery was diagnosed with a glioblastoma multiforme brain tumor (glioblastoma), an aggressive form of brain cancer. After attempts at treatment, Avery died on October 18, 2006.

On February 20, 2008, plaintiff filed a complaint against defendant pursuant to the FELA, alleging negligence in failing to provide a safe work environment. Plaintiff alleged that Avery's work caused him to be exposed to "harmful, hazardous and toxic chemicals and substances," of which defendant knew or should have known and that directly caused plaintiff to develop brain cancer and eventually pass away.

On April 17, 2009, plaintiff filed a motion to compel discovery, alleging that defendant's objections to plaintiff's interrogatories, requests for production, and requests for admission were

without merit. Defendant argued that without any peer-reviewed literature demonstrating a causal link between the alleged toxic exposures and glioblastomas, plaintiff's discovery requests were not reasonably calculated to discover admissible evidence. At the hearing on the motion, the trial court agreed with defendant that none of plaintiff's proffered peer-reviewed literature demonstrated any links to glioblastomas in particular rather than brain cancer, generally.

On May 29, 2009, defendant filed a motion for summary disposition on the ground that plaintiff had failed to produce any scientifically reliable evidence demonstrating a causal link between toxic occupational exposure and glioblastomas. The trial court denied the motion but scheduled a *Daubert*[1] hearing to determine whether plaintiff's proposed expert testimony would be admissible. Before the *Daubert* hearing, on October 30, 2009, defendant also filed a motion to exclude plaintiff's expert testimony again alleging that plaintiff had failed to produce any scientifically reliable evidence demonstrating a causal link between toxic occupational exposure and glioblastomas.

At the *Daubert* hearing, plaintiff called Dr. Neil Abramson to testify that his review of peer-reviewed scientific literature revealed that there was an "association" between brain cancer and Avery's occupation. Defendant called Dr. Andrew Sloan to testify that Dr. Abramson's review of the literature did not appropriately focus on glioblastomas, the type of brain cancer Avery suffered, and that the literature cited by Dr. Abramson established only "associations" between various exposures and brain cancer, but no causal links. The trial court found that Dr. Abramson had not presented any scientific literature discussing glioblastomas in particular. The trial court also found that there was no actual medical evidence from Avery from which to conclude that he had exposure to any of the possible toxic agents identified by Dr. Abramson as associated with brain cancer—lead, welding agents, or electromagnetic fields. Ultimately, the trial court held that Dr. Abramson's "testimony is [not] going to be based on sufficient facts or data that would allow [the court] to send this case to the jury," and granted defendant's motion to exclude plaintiff's expert testimony.

Accordingly, defendant filed a second motion for summary disposition on October 9, 2009. After a brief hearing, the trial court granted the motion on the basis that, without Dr. Abramson's testimony, there was no evidence of causation between Avery's workplace exposures and his cause of death. The trial court memorialized its ruling in an order entered on February 5, 2010. It is from this order that plaintiff now appeals.

II

Plaintiff first argues that the trial court erroneously excluded Dr. Abramson's expert testimony on the basis of an overly strict and inapplicable standard of admission. Defendant responds that Dr. Abramson simply failed to provide scientifically reliable evidence of a causal link between Avery's occupation and his glioblastoma. This Court reviews for an abuse of discretion the trial court's decision whether to admit expert testimony. *Chapin v A & L Parts*,

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[1] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 592; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Inc, 274 Mich App 122, 126; 732 NW2d 578 (2007). The interpretation of evidentiary rules is reviewed de novo. *Id*.

The FELA provides, in relevant part: "Every common carrier by railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 USC 51. "When a party files a FELA case in state court, we apply federal substantive law to adjudicate the claim while following state procedural rules." *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 421; 688 NW2d 296 (2004).

The linchpin in this case is the admission of expert testimony, subject to MCL 600.2955 and MRE 702. MCL 600.2955 provides, in pertinent part: "[A] scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact," and provides a list of factors to consider with respect to the scientific reliability of the testimony. MCL 600.2955(1). MRE 702 provides:

> If the court determines the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, the plain language of MRE 702 establishes three broad preconditions to the admission of expert testimony: (1) the expert must be qualified, (2) the proposed testimony must assist the trier of fact; that is, it must be relevant, and (3) the scientific or technical evidence must be based on sufficient facts, reliable and reliably applied to the facts of the case. *Craig v Oakwood Hosp*, 471 Mich 67, 78-79; 684 NW2d 296 (2004); see also *Daubert*, 509 US at 592 (interpreting identical federal rule). More recently, our Supreme Court observed that in addition to qualifying an expert, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Edry v Adelman*, 486 Mich 634, 640; 786 NW2d 567 (2010), quoting *Daubert*, 509 US at 589.

In this case, there is no dispute that Dr. Abramson is a qualified expert. Further, the focus of defendant's objection to Dr. Abramson's testimony is that his testimony does not establish a causal link between the occupation and death from brain cancer of plaintiff's decedent, Robert Avery. The trial court's conclusion to exclude the evidence was expressly based on its opinion that Dr. Abramson's testimony would not assist the jury in determining a "fact in issue"—i.e., causation. Thus, the primary issue in this case is whether Dr. Abramson's testimony was relevant to plaintiff's case based on whether it established a causal link between Avery's occupation and his cancer. Generally, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 401.

In a FELA action, the standard of causation differs from the common-law standard of proximate cause. The Supreme Court stated:

> Under this statute the test of a jury case is *simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought*. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. [*Rogers v Mo Pac R Co*, 352 US 500, 506; 77 S Ct 443; 1 L Ed 2d 493 (1957) (emphasis added, internal footnotes omitted); see also *Conrail v Gottshall*, 512 US 532, 543; 114 S Ct 2396; 129 L Ed 2d 427 (1994) (noting FELA's "relaxed standard of causation" as explained in *Rogers*).]

This Court has also observed the relaxed standard of causation in FELA actions: "A plaintiff bringing suit under the FELA need not prove proximate causation, but need only show that the injury resulted 'in whole or in part' from a violation of the FELA." *Boyt v Grand Trunk W R*, 233 Mich App 179, 187; 592 NW2d 426 (1998). Thus, Dr. Abramson's expert testimony must be evaluated according to this standard.

Dr. Abramson's conclusion of his survey of relevant scientific literature, as applied to this case was, "[Avery] clearly had a brain tumor and he was in an occupation that has some epidemiological evidence that is reproducible, that has been shown in a number of instances to be associated with it. And if I had to pick one chemical factor—in addition to the, no doubt, others—but if I had to pick one, at least there's more information about lead and its association with brain tumor[s] to make it something to bring before you." He also stated that he felt that Avery's occupation as a welder was a "risk factor" for brain cancer. His conclusion was based on a review of five scientific studies.

Defendant's argument in the trial court was that none of the studies cited by Dr. Abramson specifically discussed Avery's specific type of brain cancer—glioblastoma (though none of the studies excluded it either). Further, the studies discussed a number of different possible causes, notably exposure to lead or electromagnetic fields. Dr. Abramson was also unfamiliar with, and could not testify regarding, the specifics of possible exposures experienced by Avery in his work. Defendant asserted that because Dr. Abramson failed to establish a direct causal link between Avery's occupational exposures and his death from brain cancer, his testimony was not relevant to plaintiff's cause of action and must be excluded.

After reviewing the record, we agree that Dr. Abramson has not established a "direct causal link" between Avery's occupational exposures and his glioblastoma. But the causation standard for a FELA action does not require such a link and is markedly relaxed. In order to reach the trier of fact in a FELA action, a plaintiff need only offer proof justifying a conclusion the defendant's "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 US at 506. There may be outstanding questions regarding whether plaintiff can offer proof regarding the actual agents to which Avery was exposed as a part of his occupation but this is only tangentially related to the admission or exclusion of Dr. Abramson's testimony. Dr. Abramson's expert testimony was merely intended to establish some association between welders and other workers exposed to lead, in particular,

and brain cancer. It would not be Dr. Abramson's role to know or opine about Avery's actual occupational exposures. We therefore conclude that the trial court erred when it excluded Dr. Abramson's testimony on the ground that it was not relevant to the issue of causation in this case because Dr. Abramson's testimony established some reason for concluding that there is a link between Avery's occupational exposures and brain cancer. *Id*.

III

Plaintiff next argues that because the trial court erred when it excluded Dr. Abramson's testimony, granting summary disposition in defendant's favor was similarly error. Defendant responds that despite the lower standard of causation in the FELA, plaintiff must still present evidence that is more than speculative and summary disposition was proper. On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

The trial court granted summary disposition in defendant's favor on the ground that plaintiff had not presented any evidence of causation to support its claims. But our review of the record reveals that Dr. Abramson's testimony was relevant to, and represented at least some evidence of causation in this case. Moreover, Dr. Abramson's testimony does not constitute the totality of plaintiff's case, merely the scientific foundation for it. Because the trial court improperly excluded Dr. Abramson's testimony, summary disposition was also improper. In any event, summary disposition is generally premature before discovery is complete. *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005).

IV

Plaintiff finally contends that the trial court improperly denied her motion to compel discovery based on its finding that she had not provided any expert testimony or peer-reviewed literature in support of her claims, notably on the issue of causation. Defendant responds that the trial court correctly concluded that plaintiff's discovery requests improperly constituted a "fishing expedition." This Court reviews a trial court's ruling on a motion to compel discovery for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005).

The Michigan court rules establish "an open, broad discovery policy." *Cabrera*, 265 Mich App at 406-407. Discovery is permitted for any relevant matter, unless privileged. *Id*. However, "a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Id*. In this case, the trial court denied plaintiff's motion to compel on the basis that, in the court's opinion, plaintiff had not yet made out its FELA cause of action with respect to causation. The trial court's sole basis for denying the motion was the fact that plaintiff had not presented any peer-reviewed literature directly linking occupational exposure to glioblastomas. Certainly, if plaintiff could not proffer any support for her causation argument, denying a motion to compel discovery would be appropriate. See *Oliver v Smith*, 269 Mich App 560, 569; 715 NW2d 314 (2006) (summary disposition is appropriate before completion of discovery if discovery stands no reasonable chance of uncovering factual support).

But at the time of the motion to compel, plaintiff did present two scientific studies that Dr. Abramson later testified regarding at the *Daubert* hearing. Neither study distinguished between different types of brain cancers but they did demonstrate an increased incidence of brain cancer in railroad workers and, in particular, welders in the railroad industry. And significantly, neither study excluded glioblastomas. Again, the standard of causation in a FELA case is considerably relaxed. Plaintiff "need only show that the injury resulted 'in whole or in part' from a violation of the FELA." *Boyt*, 233 Mich App at 187. After reviewing the record, we conclude that while the studies presented failed to make out a conclusive causal link between a specific occupational exposure and Avery's brain cancer, they nevertheless provided a scientific association between Avery's occupation and brain cancer. While more factual development is required to flesh out the causation argument, the studies provided by plaintiff, and expounded upon by Dr. Abramson, do not preclude plaintiff's ability to make out its FELA cause of action. The trial court improperly denied plaintiff's motion to compel discovery.

V

The trial court improperly excluded Dr. Abramson's testimony on the ground that it did not provide evidence of causation. The trial court erred in granting defendant's motion for summary disposition because the trial court improperly excluded Dr. Abramson's testimony and because it was premature. The trial court improperly denied plaintiff's motion to compel discovery.

Reversed and remanded. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause